

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEELAND O. WHITE,
Appellant,

v.

INTERNATIONAL BOUNDARY & WATER
COMMISSION (U.S. SECTION),
Agency.

DOCKET NUMBERS
DA315H920385I1
DA1221920546W1

DATE: SEP 17 1993

Leeland O. White, El Paso, Texas, pro se.

Randall A. McMains, Esquire, El Paso, Texas, for the
agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision which dismissed these consolidated appeals as moot. For the reasons set forth below, we DISMISS the petition for review as moot.

BACKGROUND

The agency removed the appellant from his Security Guard position during his probationary period. Initial Appeal File (IAF), tab 5, subtabs 4e & 4f (MSPB Docket No. DA315H920385I1). The appellant filed a petition for appeal in

which he alleged that the agency did not follow the appropriate procedures in effecting his removal. *Id.*, tab 1. He later instituted an individual right of action (IRA) appeal, alleging that the agency had removed him in retaliation for his whistleblowing activities. See IAF, tabs 1 & 2 (MSPB Docket No. DA1221920546W1). The two appeals were consolidated with the parties' consent. *Id.*, tab 3.

The agency filed a motion to dismiss the appeals as moot, and submitted evidence indicating that the removal had been cancelled, that the appellant would be returned to active duty, and that he would receive back pay. *Id.*, tab 8. Over the appellant's objection, *id.*, tab 9, the administrative judge dismissed the appeals as moot. *Id.*, tab 10.

The appellant filed a petition for review on September 14, 1992, in which he alleges that he was not returned to the status quo ante following the dismissal of his appeals. Petition for Review File (PRF), tab 3. Specifically, he claims that upon his reinstatement the agency reassigned him from his former station on the Cordova Bridge to a "special guard shack" which had been "set up" for him under a smokestack that emitted sulfur dioxide; he further alleges that the shack was not air conditioned, and that after two weeks of exposure to 100-degree temperatures he developed a rash requiring medical treatment. *Id.* The appellant also submitted evidence that the agency had removed him, for a second time, on September 4, 1992. *Id.* (attachments). The agency has not responded to the petition for review.

ANALYSIS

The petition for review is moot because the Board cannot grant effective relief.

When an agency completely rescinds a personnel action after an appeal is filed -- that is, when it restores the employee to the status quo ante -- the appeal is rendered moot and the Board is divested of jurisdiction. *McCulley v. U.S. Postal Service*, 54 M.S.P.R. 207, 209 (1992). See also *Taylor v. Department of Education*, 54 M.S.P.R. 406, 410 (1992) (mootness doctrine applies in an IRA appeal). Reinstatement followed immediately by a detail or reassignment, however, may not constitute a return to the status quo ante; the Board will carefully scrutinize the legitimacy of the agency's rationale for the detail or reassignment. *Mann v. Veterans Administration*, 29 M.S.P.R. 271, 274 (1985).¹

The petition for review raises questions as to whether the appellant was restored to the status quo ante after his appeals were dismissed, but on the present record we cannot determine whether the change in the appellant's responsibilities was either material or improper under *Mann*. Normally under such circumstances we would remand the appeal

¹ Although *Mann* involved a petition for enforcement of a final Board decision, its approach has been explicitly adopted in appeals involving questions of mootness. *Berteletti v. U.S. Postal Service*, 45 M.S.P.R. 1, 6 (1990). See also *Palmer v. U.S. Postal Service*, 50 M.S.P.R. 552, 556 (1991) (in order to determine whether a personnel action has been completely rescinded, the Board will compare the duties and responsibilities of the position to which the appellant was returned to those of the position which he or she held prior to the cancelled action).

to the regional office for further proceedings. See *McCulley*, 54 M.S.P.R. at 210. To remand these appeals, however, would be pointless. Assuming *arguendo* that the administrative judge found on remand that the first removal action was not completely rescinded, and even given the fact that the agency concedes that the first removal was procedurally invalid, IAF, tab 8 (MSPB Docket No. DA1221920546W1), the appellant would gain nothing more than a declaration that he was temporarily treated improperly. He would not be restored to his former position, other than on paper perhaps, because on September 4, 1992, he was again removed.

The petition for review is therefore moot, because "the Board cannot grant effective relief." *Conrad v. Department of Justice*, 24 M.S.P.R. 452, 454 (1984). See also 5 U.S.C. § 1204(h) ("[t]he Board shall not issue advisory opinions"); *Villarreal v. Department of the Treasury*, 13 M.S.P.R. 82, 84 (1982) (the Board will dismiss a petition for review if a disposition ostensibly in favor of the party filing the petition "would have no effect").

Accordingly, the appellant's petition for review must be dismissed.²

² The appellant states in his petition for review that he has filed a grievance contesting the second removal, PRF, tab 3 (at 2), but there is nothing to indicate that the grievance has been resolved. Whether the appellant could revive these appeals if he were to prevail in his grievance and were not returned to his position prior to the first removal is not properly before us.

ORDER

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

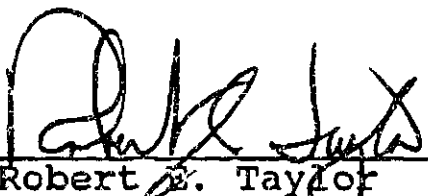
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.